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COURT OF CRIMINAL APPEALS
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No. PD-1380-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
5/16/2017
ABEL ACOSTA, CLERK

THE STATE OF TEXAS, Appellant

v.

GEOVANY HERNANDEZ, Appellee

Appeal from Gillespie County

* * * * *

# STATE'S BRIEF ON THE MERITS

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## IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellee, Geovany Hernandez.

* The trial Judge was the Honorable N. Keith Williams, 216th Judicial District Court.

* Trial counsel for the State at trial and on appeal was John Hoover, 200 Earl Garrett Street, Suite 201, Kerrville, Texas 78028.

* Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

* Counsel for Appellee at trial and on appeal was Cheryl Crenwelge Sione, 520 W. Main Street, Fredericksburg, Texas 78624.

## INDEX OF AUTHORITIES

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**Rule**

No. PD-1380-16

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

THE STATE OF TEXAS, Appellant

v.

GEOVANY HERNANDEZ, Appellee

Appeal from Gillespie County

* * * * *

**STATE'S BRIEF ON THE MERITS**

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State Prosecuting Attorney submits its Brief on the Merits.

**STATEMENT REGARDING ORAL ARGUMENT**

The State did not request oral argument, and the Court did not grant argument.

**STATEMENT OF THE CASE**

Appellee filed a motion to suppress challenging the legality of the traffic stop of a car in which he was a passenger. The officer stopped the car after observing the

driver travel over the "fog line" onto the improved shoulder in violation of Transportation Code Section 545.058(a)(7). The trial court granted the motion, and the court of appeals affirmed. It held that the improved shoulder does not include the "fog line," so the driver's first act of moving onto the line without crossing over its outer edge was lawful. The court held that the driver's second act of driving on the improved shoulder was also lawful; it was "necessary" "to avoid a collision" because it was night on a two-lane roadway and there was a vehicle traveling in the oncoming lane.

## STATEMENT OF PROCEDURAL HISTORY

The court of appeals affirmed the trial court's order granting Appellee's motion to suppress. *State v. Hernandez*, No. 04-16-00110-CR, 2016 Tex. App. LEXIS 12058 (Tex. App.—San Antonio Nov. 9, 2016) (not designated for publication). The State did not file a motion for rehearing. The State's petition was granted on March 29, 2017, and an extension to file its brief by May 15, 2017, was granted.

## ISSUES PRESENTED

1. **Does the improved shoulder of a road include the "fog line?"**

2. **Alternatively, because the issue whether the improved shoulder includes the "fog line" is unsettled, is there reasonable suspicion of a violation of driving on the improved shoulder when a driver drives on the "fog line" but does not cross its outer edge?**

3. **Is driving on an improved shoulder "necessary" "to avoid a collision" under TEX. TRANSP. CODE § 545.058(a)(7) simply because the driver is on a two-lane highway at night with a vehicle traveling in the opposite direction?**

## SUMMARY OF THE ARGUMENT

The court of appeals wrongly held that driving on the "fog line" but not past it did not qualify as driving on the improved shoulder. Under the plain language of the statutes and regulations, the "fog line" is part of the improved shoulder for purposes of Transportation Code Section 545.058(a).

The court of appeals also erred to hold that the officers' determination that the improved shoulder includes the "fog line" was unreasonable and therefore could not justify the stop. With no binding precedent deciding whether the improved shoulder includes the "fog line" for purposes of Section 545.058(a), the officers' interpretation was objectively reasonable. The mistake of law doctrine precludes finding a Fourth Amendment violation.

Finally, the court erred in concluding that use of the improved shoulder is "necessary" "to avoid a collision" any time a driver is on a two-lane highway at night with oncoming traffic. "Necessary" should require some discernable danger or reckless driving by oncoming traffic before improved shoulder use is justified.

## FACTS

### 1. Background

Deputy Robert Blumrich, accompanied by field training officer Sergeant Nick Moellering, observed the car Appellee was a passenger in "abruptly turn off to the right like [he] was going to make a U-turn" but, instead, resume driving in the same direction. 1 RR 8, 13, 22, 26. Blumrich and Moellering found this suspicious and followed. 1 RR 8, 31. Blumrich stopped the car after the driver crossed the "fog line" onto the improved shoulder of the highway twice. 1 RR 11-12, 15, 26-27. The second time, Blumrich recalled, the car drove halfway over the improved shoulder.[1] 1 RR 18. Moellering estimated that it was six inches. 1 RR 34. At the suppression hearing, when Moellering was asked if he saw anything to indicate that the driver was trying to avoid a collision or make a right turn when he drove on the improved shoulder, Moellering stated:

> I did not see any obstructions in the roadway that would lead to a car swerving during drifting out of the main lane of travel, nor did I observe a turn signal which would indicate to me that they were slowing to make a turn from the improved shoulder into a private drive or one of the roadways that's along the way.

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[1] According to Moellering, the highway at that point had three lanes: a southbound lane that the car was using, and two northbound lanes. 1 RR 32. However, a review of the video recording establishes that the highway was only two lanes when the car crossed the "fog line" the second time. *See* State's Exhibit 2.

> And at that point our emergency lights were not activated to make the driver believe that we were going to pull over and they were supposed to yield to us for some reason.

1 RR 29. When the second cross-over occurred, Moellering testified, he had not been looking at oncoming traffic. 1 RR 31-32. He believed that the car did not create any danger when crossing the "fog line." 1 RR 34. Both officers smelled marijuana when they approached the car. 1 RR 12, 14, 28. They later arrested Appellee for tampering with evidence and possession of marijuana. 1 RR 14.

**2. Trial Court's Ruling**

Despite finding both officers credible, the trial court granted Appellee's motion to suppress. 1 CR 9. As to the first cited "fog-line" cross-over, the trial court offered two remarks: first, "I can see he's on the fog line, but I can't – – it's not clear to me that he crossed over the fog line" and, second, "[w]hen it did go over the fog line it was very gradual." 1 RR 47, 49. As to the second infraction, the court concluded: "it was a prudent maneuver for him to move over just a little bit just to avoid – – there's nothing sudden, but I think that's what prudent drivers they'll veer over a little bit just to make sure it gives them a little cushion at nighttime, especially from another vehicle." 1 RR 48-49.

**3. Court of Appeals' Decision**

The court of appeals affirmed. *Hernandez*, 2016 Tex. App. LEXIS 12058, at

*18. Addressing the first cross-over, the court held that it was required to defer to the trial court's finding that the car did not cross over the line and, as a consequence, it determined that the car did not travel onto the improved shoulder. *Id*. at *10-11. Next, acknowledging that the car did cross onto the improved shoulder the second time, the court agreed with the trial court's determination that the driver's movement was permissible—it was necessary to avoid a collision and not unsafe. *Id*. at *11-13.

## ARGUMENT

### 1. The "Improved Shoulder" Includes the "Fog Line."

Transportation Code Section 545.058(a), entitled "Driving on Improved Shoulder" states:

> An operator may drive on an improved shoulder to the right of the main traveled portion of a roadway if that operation is necessary and may be done safely, but only:
>
> (1) to stop, stand, or park;
> (2) to accelerate before entering the main traveled lane of traffic;
> (3) to decelerate before making a right turn;
> (4) to pass another vehicle that is slowing or stopped on the main traveled portion of the highway, disabled, or preparing to make a left turn;
> (5) to allow another vehicle traveling faster to pass;
> (6) as permitted or required by an official traffic-control device; or
> (7) to avoid a collision.

In *Lothrop v. State*, this Court held that the seven subsections are not defensive issues but, instead, are circumstances under which a driver is authorized to use the

improved shoulder. 372 S.W.3d 187, 191 (Tex. Crim. App. 2012). The Court therefore interpreted "necessary" to exclude "absolutely necessary" and held: "illegally driving on an improved shoulder can be proved in one of two ways: either driving on the improved shoulder was not a necessary part of achieving one of the seven approved purposes, or driving on the improved shoulder could not have been done safely." *Id*.

The issue now before the Court is: Whether the "fog line" on a roadway with an improved shoulder is part of the roadway ordinarily traveled, a neutral zone, or part of the improved shoulder. Providing a concrete rule that differentiates lawful and unlawful driving under these circumstances creates a novel variation on the adage, "it's a fine line." Under the plain language of the applicable statutes in this circumstance, the "fog line" is part of the improved shoulder. *See Boykin v. State*, 818 S.W.2d 782, 785-86 (Tex. Crim. App. 1991) (courts are prohibited from looking beyond the plain text unless it is ambiguous or its plain meaning would lead to an absurd result that the Legislature could not have intended).

"Roadway," as included in Section 545.058(a), is defined as "the portion of a highway, other than the berm or shoulder, that is improved, designed, or ordinarily

used for vehicular travel." TEX. TRANSP. CODE § 541.302(11). "Shoulder"[2] is defined as "the portion of a highway that is: (A) adjacent to the roadway; (B) designed or ordinarily used for parking; (C) distinguished from the roadway by different design, construction, or *marking*; and (D) not intended for normal vehicular travel." TEX. TRANSP. CODE § 541.302(15) (emphasis added). And a "marking" is defined as an "[o]fficial traffic-control device" that is used to "regulate, warn, or guide traffic." TEX. TRANSP. CODE § 541.304(1)(C). "When used, white markings for longitudinal lines shall delineate: A. The separation of traffic flows in the same direction, or B. The right-hand edge of the roadway." Texas Manual on Uniform Traffic Control Devices (MUTCD), §§ 3A.05.02 (p. 370);[3] 1A.13.03, 58 (p. 13) (defining "Edge Line Markings" to include "white or yellow pavement marking lines that delineate the right or left edge(s) of a traveled way.").

So, according to these definitions, the portion of a roadway used for ordinary travel (the converse of "not intended for normal vehicular travel" under TEX. TRANSP. CODE § 541.302(11)) does not include the paved, improved shoulder. And, because

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[2] An "[i]mproved shoulder" "means a paved shoulder." TEX. TRANSP. CODE § 541.302(6).

[3] The MUTCD is "incorporated by reference in the Texas Administrative Code, Title 43, Section 25.1 and shall be recognized as the Texas standard for all traffic control devices installed on any street, highway, bikeway, or private road open to public travel . . . in accordance with 23 U.S.C. §§ 109(d) and 402(a)."

the "shoulder" is adjacent to the roadway and can be distinguished from it by a "marking," such a "marking" is not an unregulated, no man's land area devoid of classification that exists apart from the roadway and shoulder. Because it delinates the right-hand part of the roadway, the "marking" is part of the "shoulder" and separate from the "roadway." The "marking" as part of the "shoulder" functions to "regulate, warn, and guide traffic" traveling on the roadway. A "fog line" is a "white" "longitudinal" "marking" that is intended to "regulate, warn, and guide traffic" that is using the part of roadway for "ordinary travel." The "fog line" itself therefore demarcates the very first point of departure from the designated roadway. Any travel exceeding the roadway onto the "fog line" qualifies as use of the "improved shoulder."[4]

[4] Whether driving on the yellow line would constitute a violation of failure to maintain a single lane, TEX. TRANSP. CODE § 545.060(a), was recognized but not addressed by the plurality in *Leming v. State*, because reasonable suspicion of a violation was dispositive. 493 S.W.3d 552, 561 (Tex. Crim. App. 2016). Presumably, though, the center yellow lines would be treated similarly given the meaning MUTCD applies to "yellow" lines. On a two-way roadway, a "[t]wo-direction no-passing zone markings consisting of two normal solid yellow lines where crossing the center line markings for passing is prohibited for traffic traveling in either direction." MUTCD § 3B.01.04(C) (p. 371). Further, "[Y]ellow markings for longitudinal lines" delineate: A. The separation of traffic traveling in opposite directions, B. The left-hand edge of the roadways of divided highways and one-way streets or ramps, or C. The separation of two-way left-turn lanes and reversible lanes from other lanes. MUTCD § 3A.03 (p. 370).

Because the car here crossed onto the "fog line" twice, the stop was justified, and the motion to suppress should have been denied as a matter of law. The State urges the Court to address this issue, even though there are alterative arguments. Deciding specifically when Section 545.058(a) is implicated on roadways with a "fog line" and improved shoulder is desperately needed to ensure that police comply with the legislative intent at the outset of enforcement.

**2. Alternatively, the dispositive issue of a "fog line's" status in relation to the improved shoulder has never been decided; the stop therefore was lawful because any mistaken interpretation by the officer was reasonable.**

In *Heien v. North Carolina*, the Supreme Court addressed the validity of a traffic stop based on an officer's mistaken belief about the elements of an ambiguous brake-light traffic offense. 135 S. Ct. 530, 534-35 (2014). Even though the officer was ultimately proven wrong about the elements of the offense, his belief that a violation had been committed was reasonable, and so the stop based on that belief was also reasonable, *i.e.* supported by reasonable suspicion. *Id*. at 540. Because the Fourth Amendment forbids only those searches and seizures that are unreasonable, there was no constitutional violation. *Id*. at 539.

There has been no decision from this Court deciding whether a "fog line" is part of the improved shoulder under Section 545.058. And in 2014, when the stop was made in this case, there was no binding precedent from the San Antonio Court of

Appeals addressing the issue. Therefore, *Heien*'s mistake of law doctrine is applicable.

The Corpus Christi Court of Appeals's 2009 decision in *Scardino v. State* is the only published intermediate court decision that squarely addressed the issue. 294 S.W.3d 401, 406 (Tex. App.—Corpus Christi 2009). There, the officer testified that Scardino crossed the "fog line." *Id*. at 403. The trial court found that Scardino "was weaving across the shoulder line (fog line) . . . ." *Id*. at 404. The court of appeals held, among other things, that Section 545.058 was not violated because there was no evidence that Scardino "drove" on the shoulder.[5] *Id*. at 405-06. This decision, though instructive, was not binding on the San Antonio Court of Appeals, counties within its jurisdiction, and law enforcement within those jurisdictions. Blumrich and Moellering had no obligation to be informed of this decision or abide by it in enforcing the law.[6] *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex.

[5] Arguably, the court's decision hinged on the fact that Scardino did not continue to drive on the improved shoulder; a momentary use did not constitute "driving."

[6] Because of the circumstances of this case, there is no need to decide the scope of *Heien*'s mistake of law doctrine in a case in which a court of appeals decision controls but the Texas Court of Criminal Appeals has yet to rule on the issue. *See, e.g.*, *United States v. Sanders*, 95 F. Supp. 3d 1274, 1284-85 (D. Nev. 2015) (despite acknowledging that the only appellate court (until recently) in Nevada had not interpreted the Nevada statute at issue, the court held that the officer's interpretation was unreasonable because the Ninth Circuit had previously

1993) (Texas courts are only obligated to follow a higher Texas Court or the United States Supreme Court). *See also, generally*, TEX. R. App. P. 41.3 (a court of appeals must apply the precedent applicable in the court of appeals district of the transferred case).

*State v. Tarvin*, decided in 1998, addressed the "fog line" in the context of Transportation Code Section 545.060, which requires a driver to maintain travel in a single lane.[7] 972 S.W.2d 910, 912 (Tex. App.—Waco 1998, pet. ref'd). There, the evidence showed that Tarvin drove on or over the "fog line" or, as the Waco Court of Appeals stated, "did [no] more than go 'a little bit worse than over' the white line." *Id*. at 911. The trial court found that Tarvin never left his lane of traffic as that phrase could rationally be defined. *Id*. The State appealed, and the court of appeals affirmed, stating it would not "disturb" the trial court's factfindings. *Id*. at 912. Turning to Section 545.060(a), which the State in *Tarvin* raised for the first time on appeal, the court of appeals held that the provision could not justify the stop. *Id*. Though the court's reasoning is unclear, the final sentence in the paragraph preceding

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interpreted an Anchorage, Alaska municipal code section that was "virtually identical in all material respects.").

[7] "An operator on a roadway divided into two or more clearly marked lanes for traffic: (1) shall drive as nearly as practical entirely within a single lane; and (2) may not move from the lane unless that movement can be made safely." TEX. TRANSP. CODE § 545.060(a).

its Section 545.060(a) determination indicates that it was because Tarvin's driving was not unsafe:[8] "Although mere weaving in one's own lane of traffic can justify an investigatory stop when that weaving is erratic, unsafe, or tends to indicate intoxication or other criminal activity, there is nothing in the record to show that [the officer] believed any of the above to be the case." *Id*. As with *Scardino*, Blumrich and Moellering were not bound to follow this decision. Further, because the basis of *Tarvin*'s disposition of the "fog line" issue constitutes *dicta* and is unclear, it is objectively reasonable for an officer to discount its "fog line" construction for purposes of Section 545.058.

Blumrich and Moellering acted reasonably under the law at the time of the stop. *Cf. Ex parte Chandler*, 182 S.W.3d 350, 359 (Tex. Crim. App. 2005) ("legal advice which only later proves to be incorrect does not normally fall below the objective standard of reasonableness under *Strickland*."). *Scardino*'s or *Tarvin*'s interpretation of Section 545.058 does not preclude the application of the mistake of law doctrine.

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[8] *Tarvin* was decided before a plurality of this Court, in *Leming*, held Section 545.060(a) does not require that both subsections (1) and (2) be violated to constitute an offense. 493 S.W.3d at 557-61. Before *Leming*, the prevailing view among courts of appeals was that both subsections needed to be satisfied before a violation could be established. *Id*. (discussing prior cases).

As illustrated in the Amarillo Court of Appeals' recent decision in *State v. Cortez*,[9] the particular status of the "fog line" in relation to the improved shoulder has been the subject of controversy among lower courts[10] and, so much so, that this Court has granted review of this case and *Cortez* to finally resolve the ambiguity. Because the applicable law is unsettled, mistake of law applies, and there was no Fourth Amendment violation.

### 3. "Necessary" "to avoid a collision" does not include all circumstances in which there is oncoming traffic on a two-lane road at night.

The act of driving on the improved shoulder was not "necessary" "to avoid a collision." The meaning assigned by the court of appeals strips "necessary" of its

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[9] *State v. Cortez*, __S.W.3d__, No. 07-15-00196-CR, 2017 Tex. Crim. App. LEXIS 999 (Tex. App.—Amarillo 2017) (on remand from *State v. Cortez*, 2016 Tex. Crim. App. LEXIS 1194 (Tex. Crim. App. 2016), which this Court disposed of in 2016)).

[10] *Cortez* discussed *State v. Hanrahan*, No. 10-11-00155-CR, 2012 Tex. App. LEXIS 1271 (Tex. App.—Waco Feb. 15, 2012, no pet.) (not designated for publication), and *State v. Rothrock*, No. 03-09-00491-CR, 2010 Tex. App. LEXIS 6356 (Tex. App.—Austin Aug. 5, 2010, no pet.)(not designated for publication); *see also Velasquez v. State*, 2013 Tex. App. LEXIS 8246, at *2-3, 6, 9 (Tex. App.–Amarillo July 2, 2013, no pet.) (not designated for publication) (claimed Article 38.23 issue because the officer said the defendant crossed the fog line onto the shoulder but agreed he did not "straddle" the fog line); *McClish v. State*, No. 07-06-0188-CR, 2006 Tex. App. LEXIS 7927, at *1 (Tex. App.–Amarillo Sept. 5, 2006, no pet.) (not designated for publication) (officers "observed one-third to one-half of appellant's van cross the white fog line onto the improved shoulder" and later "again touch[] the fog line several times, but . . . not cross it.").

significance and therefore impermissibly alters the text of the statute. *See Boykin*, 818 S.W.2d at 785-86 (courts are prohibited from looking beyond the plain text unless it is ambiguous or its plain meaning would lead to an absurd result that the Legislature could not have intended). The court improperly imposed a meaning consistent with: "reasonable," "preferable," "prudent"—the term specifically used by the trial court—or "extra-precautionary." Taken to its logical end, that interpretation means that, under normal driving conditions, it would be permissible for all drivers to continuously straddle the main traffic lane and fog line or drive entirely on the improved shoulder when traveling at night on a two-lane country road so long as there is oncoming traffic. Such circumstances would essentially creates a *per se* need "to avoid a collision." This cannot be the Legislature's intent. Further, the clear consequence—that other drivers may be prevented from using the improved shoulder for a permissible purpose—demonstrates the trouble with the lower court's interpretation. Use by another could not be done safely. *See Lothrop*, 372 S.W.3d at 191.

"Necessary," when used in conjunction with "to avoid a collision" in subsection 545.058(a)(7), should require some showing of real endangerment, not a mere hypothetical risk of danger. *Cf. Cates v. State*, 102 S.W.3d 735, 738 (Tex. Crim. App. 2003) (for a vehicle to be "used or exhibited" as a deadly weapon, there must

be more than a hypothetical potential for endangerment). In other words, there should be some evidence of endangerment beyond: (1) driving, (2) on a two-lane country road, (3) at night, with (4) oncoming traffic. Some objectively demonstrable facts evidencing dangerous or reckless driving by another should be shown before "necessary" "to avoid a collision" can reasonably support an officer's determination that a driver is not violating subsection 545.058(a)(7). *Cf. Sierra v. State*, 280 S.W.3d 250, 255 (Tex. Crim. App. 2009) (assessing manner of use of a vehicle as a deadly weapon finding to require a capability of causing death or serious bodily injury, which is usually evidenced by reckless and dangerous driving). Such a requirement would fit neatly between no real necessity (*i.e.*, "reasonable," "preferable," "prudent," or "extra-precautionary")—the court of appeals' standard—and absolute necessity, which was rejected in *Lothrop*.

As applied here, there was no evidence that the car Appellee was in was endangered by the mere presence of an oncoming car traveling in the opposite direction. Though Moellering was not focusing on the oncoming traffic, he saw nothing to indicate that the driver was trying to avoid a collision. 1 RR 29, 33 ("We were traveling close enough that I would have been able to see a cat, dog, deer cross . . . ."). Because the trial court found Moellering credible, there was no factual basis supporting the legal determination that driving on the improved shoulder was

"necessary" "to avoid a collision." Its decision was purely a legal one. Further, there is no other objective evidence—like dangerous road conditions—showing that the movement was "necessary." As the prosecutor argued at the hearing, "I would think if there was a real possibility the deputies would have made evasive action too." 1 RR 37. Based on the record, the officers were justified in having a reasonable belief that the driver committed a traffic violation.

**4. Conclusion**

The legal conclusions underlying the court of appeals' decision affirming the suppression ruling are incorrect. A reversal is warranted because the stop was supported by reasonable suspicion that the driver drove on the improved shoulder in violation of Section 545.058. First, because the "fog line" marking includes the improved shoulder, the driver unlawfully used the improved shoulder. Second, it was objectively reasonable for the officers to have concluded that the shoulder includes the "fog line" because no binding intermediate or high-court determination on the issue has been made. Finally, driving at night on a two-lane country highway under normal driving conditions with oncoming traffic does not, in and of itself, make it "necessary" to drive on the shoulder "to avoid a collision."

## PRAYER FOR RELIEF

The State prays that the Court of Criminal Appeals reverse the court of appeals' decision affirming the trial court's grant of Appellee's motion to suppress and reinstate the trial court's judgment.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 3,769, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

*/s/ Stacey M. Soule*
State Prosecuting Attorney

## CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Brief has been served on May 15, 2017, via email or certified electronic service provider to:

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